

OGC Has Reviewed

OGC 76-4298  
4 August 1976

MEMORANDUM FOR: Deputy Director of Personnel for Plans and Control

STATINTL

FROM :   
Office of General Counsel

SUBJECT : Equal Employment Opportunity Coordinating Council,  
Employee Selection Procedures, Uniform Guide-  
lines, Federal Register, Vol. 41, No. 136 -  
Wednesday, 14 July 1976

1. The referent guidelines have been published over the signature of Harold R. Tyler, Jr., Deputy Attorney General and Chairman of the Equal Employment Opportunity Coordinating Council. It is made clear that the Civil Service Commission is not required to publish these guidelines in advance of their effective date, but that publication has taken place in order to obtain views from as many sources as possible. When effective, the proposed guidelines will become supplement appendices to the Federal Personnel Manual. The question to this Office concerns what effect the proposed guidelines would have on the Agency if and when they become effective.

2. The guidelines will be applied by the Civil Service Commission to Federal agencies subject to section 717 of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972. Section 717 is applicable to all executive agencies, except the General Accounting Office, as defined in section 105 of title 5. That section defines executive agency to mean an Executive department, a Government corporation, and an independent establishment. Section 104 defines independent establishment to include an establishment in the executive branch which is not a department or Government corporation. CIA can be said to fall within this very broad definition, thereby making the proposed guidelines applicable to the Agency.

3. The guidelines are intended to regulate a wide range of management decisions, as is made clear in §2b. The guidelines will apply to selection procedures which are used as a basis for any employment decision. A selection procedure includes any measure, combination of measures, or procedures, other than a bona fide seniority system, used as a basis for an employment decision §14(h). It should be noted that employment decisions are in turn broadly defined to include hiring, promotion, payment of additional compensation, and retention. Employment decisions also include

transfers, work assignments, or training in cases where these factors are used as a basis for the payment of additional compensation, promotion, retention, etc. The only example offered of decisions outside the range of employment decisions is the use of recruiting procedures designed to attract minority employees pursuant to an affirmative action program. §2d.

4. After considering the rather broad scope of management decisions to which these guidelines potentially apply, it can be observed that the critical provision is to be found at §3a. It is there provided that any selection procedure which has an adverse impact on members of any minority group will be considered to be discriminatory unless the procedure is validated in accordance with the guidelines. A selection rate for any racial, ethnic or sex group which is less than 80% of the rate for the group with the highest rate will generally be regarded as evidence of adverse impact. §3b The practical result of these provisions would appear to be that demonstrating a selection rate for any group which is less than 80% of the group with the highest rate presents a prima facie case of discrimination. Therefore, should an administrative EEO complaint be lodged based on the fact that a selection rate for minority members is less than 80% of the group with the highest rate, the burden would thereafter appear to be on the Government to prove that the selection procedures involved are valid in accordance with principles contained in the guidelines. Presumably, should the Government fail in demonstrating validity, leading to a finding of discriminatory practice, there would come into play the authority of the Civil Service Commission, or the court, as the case may be, to order remedial action, including, as appropriate, a change in selection procedures, retroactive appointment or promotion, or cancellation of an adverse personnel action. In sum, it may be said that under the new guidelines if an agency is unable to justify its personnel practices and procedures when challenged, it may be ordered to change them.

5. Even in the absence of a challenge, §4b proscribes that an agency should examine its records to determine if its selection procedures have an adverse impact on minority groups. If adverse impact is not discovered, the selection process need not be further studied. If the selection process does have adverse impact, the individual components of the selection process should be evaluated. §4b However, the guidelines appear to stop short of saying unequivocally that the offending component of the selection process must be eliminated. Instead, §3b concedes that there may be circumstances in which it is not feasible or not appropriate to utilize the validation techniques contemplated by these guidelines, in which case the employer should utilize selection procedures which are as job related as possible and which will minimize or eliminate adverse impact.

6. The conclusion seems inescapable that the proposed guidelines hold the potential for forcing the executive agencies, including CIA, to shoulder a much greater burden in terms of justifying personnel management practices, at least in the area of hiring and promotion, vis-a-vis minority groups.

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In cases where operational requirements are not a factor, however, it would seem that the Agency will have to take note of the guidelines when, and if, they become effective and take steps to comply with them. If, for example, examination of employee records indicates that the Agency hiring procedures are having an adverse impact on minority selection for a certain job classification and if the adverse impact is traceable to unrealistically high qualification standards, the guidelines would indicate that the standards should be lowered, hopefully on the Agency's own initiative, or quite possibly as a result of challenge of the standards in the context of an EEO complaint. In any event, it seems quite clear that the proposed guidelines would make it easier for complainants to challenge personnel management procedures and more difficult for the validity of such procedures to be demonstrated.

7. Presumably, the technical standards for validity studies that have been included in the guidelines are well worked out and will permit actual job requirements to be found not in conflict with the technical standards. While in the judgment of the undersigned the technical standards will permit even such unusual job requirements, as envelope certain CIA positions to stand unaffected, it may be that additional language recognizing the unique requirements or special missions and functions of certain employer agencies would buttress our position. If you believe that modifying the guidelines in this fashion would be desirable, I would be glad to meet with you and the Director of our Office of Equal Employment Opportunity in order to work out a proposed modification to be submitted to the Chairman of the Equal Employment Opportunity Coordinating Council.

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ROUTING AND RECORD SHEET

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626 C of C

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12 August 1976

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COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

1. DD/Pers-P&C

[ ] has requested that we attempt to get in writing the definition of the selection rate as it applies to hiring. He suggested that I draft a memo for your consideration....

Meanwhile, [ ] is drafting a suggested revision to the regulation to modify the reporting requirements (on impact and validification) for national security agencies. [ ] can give you more details. [ ] and Ware were also attendees at our meeting and are aware of the problem. Ware was quite positive and constructive.



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